2000

The Geothermal Company, a Nevada corporation v. Far West Capital Inc., Steamboat Development Corporation : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

The Geothermal Company, a Nevada corporation, Appellant, v. Far West Capital, Inc., a Utah corporation; Steamboat Development Corporation, a Utah corporation, Appellees.	)	Priority No. 15 Case No. 20000348

APPELLEES' BRIEF

Appeal From a Final Decision of The Third District Court
The Honorable William B. Bohling

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IN THE UTAH COURT OF APPEALS

The Geothermal Company, a Nevada corporation,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
Far West Capital, Inc., a Utah corporation; Steamboat Development Corporation, a Utah corporation,	)	Case No. 20000348
	)	
Appellees.	)	

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STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Far West Capital ("FWC") had a right to reject a financing arrangement offered by The Geothermal Company ("TGC") where the parties' written agreement provided that (a) funding of a loan was a condition precedent of a transaction, (b) the agreement was not binding until the loan was provided, and (c) FWC had a right to reject the loan if its terms, or the terms of the associated transaction were unsatisfactory to FWC, and where TGC tendered performance that did not include the loan and the terms of the entire transaction were not acceptable to FWC?

2. Did the district court correctly hold that the Statute of Frauds precluded any alleged oral modification of the parties written agreement, where the oral agreement would have waived an express condition precedent defined as "material" by the parties, where the doctrine of part performance does not apply because TGC was not seeking specific performance?

3. Did the district court correctly hold that no cause of action for quantum meruit existed where an express contract existed, where that contract was terminated according to its terms, and where the contract called for each party to bear its own expenses in the event the contract was terminated?

Standard of Review:

This Court reviews the district court's ruling for error. *Interwest Constr. Co. v. Palmer*, 923 P.2d 1350, 1358-89 (Utah 1996). However, the district court may be affirmed on any basis that appears in the record. *Orton v. Carter*, 970 P.2d 1254, 1259 (Utah 1998).

In reviewing a ruling on a 12(b)(6) motion to dismiss, the allegations of the complaint are taken as true and liberally construed, and the plaintiff is entitled to the benefit of any inferences which can reasonably be drawn from those allegations. *Olson v. Park-Craig-Olson, Inc.*, 815 P.2d 1356, 1360 (Utah App. 1991). TGC suggests that, in reading the Complaint, this Court may consider "unpled facts." (Aplt. Br. at 13) That is true, but only in a limited way. It is clear that the "unpled facts" which may be considered are only those which may be reasonably inferred from the facts that **are** pled. *See, e.g.*, *Olson*, 815 P.2d at 1360 (motion to dismiss granted when "under no set of facts proven in support of the claim **as pleaded** would a party be entitled to relief" (emphasis added)). The Court is not required to conjure up unpled facts out of thin air. Nor is the Court required to infer unpled facts which are inconsistent with the facts which **have** been alleged, including facts which appear on the face of documents which TGC has incorporated into its Complaint.

DETERMINATIVE STATUTES

Utah Code Ann. § 25-5-1

(Statute of Frauds)

Estate or interest in real property. No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing.

Utah Code Ann. § 25-5-8

(Doctrine of Part Performance)

Right to specific performance not affected. Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

STATEMENT OF THE CASE

This breach of contract action was dismissed on a motion under Utah R. Civ. P. 12(b)(6). The documents allegedly reflecting the contract were attached and incorporated into the Complaint. (R.16:1-205) The district court reviewed the relevant documents and the allegations of the Complaint and held that no breach of the signed, written agreement had occurred. Rather, the contract was terminated according to its terms. Any alleged oral modification of the written agreement was barred by the Statute of Frauds.

The Dealings of The Parties

In 1994, Far West Capital ("FWC") – owner of a new, valuable, but temporarily cash-strapped geothermal energy plant – was approached by The Geothermal Company ("TGC"). TGC brought no cash of its own to the table (R.16:60-63), but claimed to have expertise in raising money from outside investors. TGC offered to raise capital in exchange for half ownership.

A Letter of Intent ("LoI") was signed on August 10, 1994, to allow TGC to begin a search for investors. (R.16:16-24)

The LoI provided that, **if** TGC arranged a $1 million loan (the "Loan") by a date certain, **and if** TGC completed a "roll-up" acquisition of two related entities ("1-A" and the "Fund") within one year of closing the Loan, **then** FWC and TGC would execute a "mutually acceptable" – but still unnegotiated – option agreement. TGC would receive

a one-year option to acquire a 50 percent interest in the plant (**referred** to in the LoI as "SB II and III") for approximately $4 million, and would receive rights related to future financing.

The LoI bristles with express provisions reflecting FWC's lack of certainty about TGC's ability to raise cash at all – let alone on favorable terms – and FWC's consequent need for the ability to terminate the transaction if the terms ultimately presented were unfavorable. For one thing, the timely funding of the Loan on specified terms was made a linchpin, and an express **condition prec**edent, of the entire transaction. The LoI contains the following terms, with emphasis added:

- TGC will acquire an option from FWC to obtain the interests and rights described above **for arranging a One Million Dollar ($1,000,000) loan** to FWC . . . . (Executive Summary ¶ A., R.16:17)

- Neither FWC nor TGC shall have any obligation to proceed with this Agreement, nor any transaction described herein, **until TGC provides proof, satisfactory to FWC, that TGC is ready, willing and able to proceed with the Loan** on the terms and conditions described in paragraph 1 below, which must occur on or before December 1, 1994. (Executive Summary ¶ C, R.16:18)

- **When TGC establishes its ability to proceed with the Loan** pursuant to the preceding paragraph C, both FWC and TGC shall complete the following documentation to be placed in escrow as a condition of closing the Loan: an executed mutually acceptable option agreement . . . . (Executive Summary ¶ D, R.16:18)

- The completion of the preceding documentation . . . shall be commenced as soon as possible, . . . nevertheless FWC shall not be required to actually deposit any documents into escrow **until TGC**

tenders performance of its Loan obligations as set out in this Agreement. (Executive Summary, R.16:18)

- All obligations of FWC shall be **contingent upon TGC providing the Loan** on the following terms: [describing $1,000,000 principal balance, payable to FWC not later than December 1, 1994, with specified interest and payment terms, and specifying security offered]. (Material Terms ¶1(i) - (v), R.16:18-19)

- **In the event that TGC fails to close the Loan** on or before December 1, 1994, this Agreement shall be null and void **and the parties shall each bear their own costs (including accountant's, consultant's and attorney's fees)** incurred with respect to this Agreement, without any liability or further obligation to each other. (Material Terms ¶ 1(vii), R.16:19)

- In partial consideration for TGC's funding of the Loan, and **contingent upon the prior funding of the Loan** in accordance with paragraph 1 above and successful approval of the roll-up of the Fund in accordance with paragraph 3 below, and only after TGC meets these **conditions precedent**, FWC shall sublease the geothermal mineral rights, and convey all of the power plants and the related assets . . . and liabilities of 1-A and the Fund to TGC's designated limited liability company . . . . (Material Terms ¶ 2, R.16:19)

- In further consideration for TGC's funding of the Loan, and **contingent upon the prior funding of the Loan** in accordance with paragraph 1 above, FWC will grant TGC the Option to acquire the fifty-percent interest in SB II & III for approximately ($4,000,000), . . . expiring one (1) year from the closing date of the Loan. . . . (Material Terms ¶ 4, R.16:20)

In addition, any limitation on FWC's ability to transfer assets or incur liabilities existed only "[a]s long as the Loan [was] outstanding." (Material Terms ¶¶ 2, 8, R.16:19, 22)

In October 1994, TGC sought and received a written, signed one-month extension to fund the Loan. Other terms of the LoI remained unmodified. (R.16:26-27)

By February 3, 1995, the Loan remained unfunded and FWC had received no capital from TGC.

TGC sought and received a second written, signed modification to the LoI, which, *inter alia*, reduced the Loan amount from $1,000,000 to $300,000, but increased the capital contribution to $5,000,000. (R.16:29-30). The February 3, 1995 Modification also waived the separate deadline for funding the Loan, but required the entire transaction to be completed by July 31, 1995. (R.16:32)

The February 3, 1995, Modification reiterated that the acquisition by TGC of the option it sought was "**contingent on TGCo providing the three hundred thousand dollars ($300,000) loan.**" (R.16:29 (emphasis added))

The February 3, 1995 Modification also added new elements requiring FWC's agreement before the transaction could be completed. For example, a new provision required that FWC's right to receive project income be subordinated to whomever TGC recruited to provide the financing. This subordination could take place, however, only if "the terms of the project financing [were] otherwise acceptable to . . . FWC."[1] (February 3, 1995, Modification ¶5, R.16:30-31).

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[1] The February 3, 1995, Modification also added a provision making TGC, or a designee acceptable to FWC, the operator of the project. However, that provision also required the negotiation of an operating agreement acceptable to FWC.

Most important to this action, the February 3, 1995 Modification contained the following provision at Paragraph 7 (R.16:31):

> Notwithstanding anything to the contrary contained herein or in the Letter of Intent dated August 10, 1994, and its first modification dated October 26, 1994, any and all commitments, responsibilities and/or obligations which have been set forth either in writing or verbally are **not binding** upon either party . . . **until such time as TGCo delivers to FWC and FWC receives the proceeds of the three hundred thousand dollars ($300,000) loan** as contemplated by the LoI and this Revision. Further, FWC and TGCo mutually agree that **FWC has sole right not to accept the three hundred thousand dollars ($300,000) loan** from TGCo **if the terms and conditions thereof**, as they are more fully described in loan documents yet to be created, **are not acceptable for any reason whatsoever or if the business terms and conditions associated with the loan are unfavorable in the sole opinion of FWC**. Further, the LoI and this Revision comprise the total good faith negotiations, representations, and responsibilities and obligations to date which may exist between FWC and TGCo and the conditions under which FWC may agree to accept, extend or modify the same are subject to the approval of the FWC Board of Directors and shall only become binding upon FWC with that approval. (Emphasis added.)

On May 25, 1995 – without prior agreement on any further modifications to the LoI – TGC's legal counsel presented FWC with the Private Placement Memorandum. (Complaint at ¶ 15, R.16:6-7) Among other things, the Private Placement Memorandum made no provision for the $300,000 Loan. It also provided for a capital contribution of $4,000,000, rather than $5,000,000. (R.16:155) In addition, the Private Placement Memorandum called for subordination of FWC's cash flows to the investor (R.16:66-70,

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(February 3, 1995, Modification ¶ 2, R.16:30)

75), thus triggering the provision in Paragraph 2 of the February 3, 1995 Modification expressly requiring FWC's consent to the entire financing transaction. (R.16:30-31)

The parties held discussions after May 25, 1995[2] (Complaint at ¶¶ 16-21, R.16:7-8), but FWC ultimately rejected the terms proposed in the Private Placement Memorandum, or in any subsequent negotiations, and terminated the relationship. (Complaint at ¶ 22, R.16:8-9)

TGC alleges that FWC and its directors orally agreed to terms contained in the Private Placement Memorandum (Complaint at ¶ 16, R.16:7), and that allegation must be accepted as true for the moment. Significantly, TGC does **not** allege that FWC or its directors agreed to terms proposed in meetings after May 25, 1995, but only that TGC's own people "left the meeting with the impression that all issues were satisfactorily resolved." (Complaint at ¶ 21, R.16:8) Regardless, FWC never signed any document

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[2] At one point – and one point, only – the Complaint references "March 25, 1995," instead of "May 25, 1995." (Complaint at ¶ 16, R.16:7) This can only be a typographical error. The date, March 25, 1995, has no significance in the dealings of the parties. Furthermore, the remaining allegations and arguments of TGC in the trial court reference discussions occurring only after TGC's lawyers presented the Private Placement Memorandum to FWC. (Complaint at ¶¶ 17-20, R.16:7-8)

The conclusion that the single reference to March 25 is an error is consistent with the recollection of the FWC, as well. FWC recalls that, after the signing of the February 3, 1995 Modification, they were presented, on or about May 25, 1995, with the Private Placement Memorandum as a *fait accompli.* All discussions regarding the terms of the Private Placement Memorandum took place after that date.

reflecting the alleged modifications set forth in the Private Placement Memorandum or any subsequent discussions.

This Action

For four full years after negotiations fell apart, the principals of TGC did nothing. In fact, they allowed TGC to lapse as a corporation. (R.23-24, 33)

Then, in 1999, when FWC had found an investor to buy the geothermal plant on favorable terms, TGC filed this lawsuit, causing the sale to fail.[3] (R.215:14-15)

The Complaint alleges that the LoI, its two signed modifications, and the unsigned Private Placement Memorandum contain the "contract" of the parties. (Complaint at ¶¶ 16-18, 25, R.16:7) However, the Complaint also inconsistently alleges that some terms of the parties' contract were orally agreed **after** the Private Placement Memorandum was issued. (Complaint at ¶ 21, R.16:8)

In particular, the Complaint alleges that six weeks **after** the Private Placement Memorandum was presented to FWC – and **after** FWC raised a new concern that it would be saddled with expenses related to the transaction – the parties agreed that, "as a further accommodation," TGC would "reimburse any reasonable closing costs, up to

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[3] After the district court dismissed this action – and after the time for this appeal had run – FWC filed a malicious prosecution action against TGC, which is currently pending in Nevada state court. The filing of the Nevada action apparently prompted TGC to seek, and obtain, an extension of time to file this appeal.

$300,000, out of [TGC's] financing proceeds" and "provide a letter of credit to this effect." (Complaint at ¶ 21d, R.16:8)

There is **no** indication in the Complaint that this after-the-fact "further accommodation" was intended as a substitute for the $300,000 Loan, which was an express condition precedent of the entire transaction. Yet, TGC shifted gears and made exactly that argument when FWC pointed out below that the Loan, which was the linchpin of the transaction, was omitted from the performance outlined by the Private Placement Memorandum and allegedly "tendered" by TGC. (R.215:17, 215:20-23) TGC continues arguing on appeal that the parties agreed that a $300,000 payment from the financing proceeds was a substitute for the Loan, even though this was never pled, and is, indeed, inconsistent with the Complaint. *Cf.* Complaint at ¶ 21d (R.16:8)

In sum, TGC's own Complaint is internally inconsistent as to the terms of the alleged contract, and its arguments below and here contradict the Complaint and introduce yet another element of uncertainty into the terms – yet TGC alleged in its Complaint that all material terms were "described with sufficient specificity" to allow a suit for their alleged breach.

One thing is certain: TGC never alleged satisfaction of the express conditions precedent contained in the LoI. Rather, TGC alleged only that it tendered performance under the terms of the unsigned Private Placement Memorandum, which omitted the express conditions precedent. See Complaint at ¶ 16 ("Plaintiffs . . . did

tender performance, of all acts as specified in Exhibit D [the Private Placement Memorandum]") (R. 16:7)

Whatever written and/or oral terms TGC now believes comprised the contract, TGC brought claims for its breach, as well as quasi-contract, quantum meruit and fraud claims. The Complaint sought only damages.[4] TGC did not seek – nor plead the prerequisites for – specific performance.

FWC moved to dismissed all claims. The district court granted the motion.

The district court held that the Complaint, read together with the incorporated documents, showed that the Statute of Frauds prohibited oral alteration of the LoI, and that, under the terms of the LoI, FWC had an express right to terminate. (R.215:28-29)

The district court dismissed the quasi-contract/quantum meruit claim because such claims are barred when an express contract exists and that contract was simply terminated according to its terms. (R.141) The fraud claim was dismissed because even TGC admitted it was insufficient. (R.141)

TGC never sought leave to amend its Complaint.

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[4] Inexplicably, TGC seeks more than $21,000,000 in damages, including sums it would have passed through to its alleged investor. (Complaint at ¶ 34, R.16:11) The investor is not a party to this action. TGC offers no explanation as to how payments it would have made on a loan, had the transaction been completed, can constitute "profits" to itself.

SUMMARY OF THE ARGUMENT

The written agreement alleged by TGC contains numerous provisions making the provision of a loan on specified terms a condition precedent of any obligation under that agreement. It also contains provisions giving FWC the opportunity to negotiate the terms of the ultimate financing transaction. When the loan was not timely funded, the agreement lapsed and was partially revived. In the revived agreement, the loan was still a condition precedent. Furthermore, FWC was given express rights to walk away from the transaction if terms of the loan, or if any of the business terms associated with the loan, were unsatisfactory to FWC for any reason. FWC properly exercised those rights when TGC tendered performance which did not include the loan, and which contained other terms which were not satisfactory to FWC.

The Statute of Frauds bars any attempt by TGC to modify the foregoing material terms of the written agreement. Thus, TGC cannot claim that the contract was orally modified to waive the condition precedent and bypass FWC's rights to be satisfied with the ultimate transaction. The doctrine of part performance does not apply, because this is not a case seeking specific performance.

The Court should not apply the implied covenant of good faith and fair dealing to rewrite the agreement, thereby giving TGC a unilateral right to substitute a cash payment for the loan, thereby further cutting off FWC's right to negotiate and be satisfied with the ultimate terms of the financing transaction.

Where the relationship of the parties was terminated according to the terms of their written agreement, and where the agreement provided that each should bear their own expenses, there can be no claim for quantum meruit.

ARGUMENT

I. THE AGREEMENT EVIDENCED BY THE LETTER OF INTENT WAS TERMINATED PURSUANT TO ITS TERMS.

A. TGC Ignores Numerous Provisions Making The Loan Central To The Entire Transaction.

As set forth in the Statement of the Case, the provision of the Loan on terms completely acceptable to FWC was a linchpin of the entire transaction contemplated by the LoI. The Loan was a "linchpin" because the LoI expressly and unambiguously provided that, without the Loan, the entire transaction came apart.

On this appeal, as it did below, TGC ignores the **numerous** unambiguous provisions of the LoI demonstrating the absolute centrality of the Loan and completely excusing FWC from performance if the Loan did not meet precise specifications. FWC's right to walk away from the transaction was spelled out in even stronger language when the LoI was modified in 1995, after all deadlines for funding the Loan had passed, no money had changed hands, the plant had survived without the quick infusion of cash originally promised by TGC and was developing an operating history that showed it to be less risky, more profitable and, hence, more valuable than it was thought to be when the original LoI was negotiated. (Complaint at ¶ 22, R.16:8-9)

In the original LoI, dated August 10, 1994, the Loan was expressly designated as the consideration for the options sought by TGC. (Executive Summary ¶ A, R.16:17; Material Terms ¶¶ 2, 4, R.16:19-20) All obligations of FWC were expressly made contingent upon the timely funding of the Loan, with each party bearing its own expenses if the Loan was not timely funded. (Executive Summary ¶¶ C, D, R.16:18, Material Terms ¶¶ 1, 2, 4, R.16:18-19, 20) The closing of the Loan was expressly made a "condition precedent" of the entire transaction. (Material Terms ¶ 2, R.16:19) The parties also contemplated negotiation of an option agreement, which would have given FWC the opportunity to ensure that the terms of the ultimate financing arrangement offered them a fair return for the valuable asset they were being asked to convey. (Executive Summary ¶ D, R.16:18)

B. The Final Written Modification Strengthened FWC's Express Right To Reject Both The Loan, And The Entire Transaction.

The last written modification of the LoI was made on February 3, 1995, after the extended deadline for funding the Loan had passed, and the LoI had, by its own terms, become "null and void." (Material Terms ¶ 1(viii), R.16:19) This final written modification partially revived the relationship, but it was even more tentative than in the original LoI.

The February 3, 1995 Modification reaffirmed that the entire transaction was contingent upon funding of the Loan, albeit in a reduced amount of $300,000.

(R.16:29) The February 3, 1995 Modification also expressly required FWC's acceptance of "the terms of the project financing," if FWC's rights to cash flow were subordinated to the rights of the investor recruited by TGC. February 3, 1995, Modification ¶ 5, R.16:30-31)

In addition, Paragraph 7 of the February 3, 1995, Modification (R.16:31) contains the following, critical provisions.

First, while the original LoI contained language suggesting that the parties had agreed to be immediately bound (Material Terms ¶ 13, R.16:23), Paragraph 7 of the February 3, 1995 Modification states that, "[n]otwithstanding anything to the contrary" contained in the LoI or its written modifications, all obligations were expressly made "not binding" until the Loan was both delivered by TGC and received by FWC.

Second, Paragraph 7 expressly gave FWC the "sole right not to accept" the Loan if the Loan's "terms and conditions" were "not acceptable for any reason whatsoever."

Third, Paragraph 7 expressly gave FWC the right to look beyond the "terms and conditions" of the Loan, itself, and to reject the Loan "if the business terms and conditions associated with the loan [were] unfavorable in the sole opinion of FWC."

Fourth, Paragraph 7 required approval of the board of directors of FWC to modify any of the terms of the LoI.[5]

None of the foregoing terms is ambiguous, particularly if the entire LoI and its modifications are read as a whole, as they must be. *See, e.g., Dixon v. Pro Image Inc.*, 987 P.2d 48, 52 (Utah 1999).

C. The Performance Allegedly Tendered By TGC Did Not Conform To The Terms Of The Letter Of Intent.

According to TGC's Complaint, on May 25, 1995, TGC's counsel presented FWC with the Private Offering Memorandum, containing the terms of the transaction which TGC wished to close. On its face, the Private Offering Memorandum contains no provision for the $300,000 Loan even though, under the plain terms of Paragraph 7, FWC was not bound at all until that Loan was received by FWC.

Furthermore, the Private Offering Memorandum requires FWC to subordinate its rights to cash flows to TGC's investor, thus triggering the express requirement that the entire financing transaction receive FWC's approval. The Private Offering Memorandum further differs from the February 3, 1995 Modification in that it

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[5] In one of several "straw men" in its brief on appeal, TGC goes to great pains to state that Paragraph 7 does not expressly require modifications to be in writing. (Aplt. Br. at 9) The district court never said that the "writing" requirement originated solely in Paragraph 7, but, rather, under Paragraph 7 **and** the Statute of Frauds. (R.124) Furthermore, even if the district court misspoke as to the effect of Paragraph 7 on this point, it is clear that he was correct about the applicability of the Statute of Frauds, as discussed, *infra*, in the text.

contemplates a cash contribution of $4,000,000, rather than $5,000,000, and does not include the additional equity interests which TGC was attempting to purchase from FWC's original lender, and which were to be contributed by TGC to the joint venture.

TGC argues that it was not required to satisfy an express condition precedent by funding the Loan, because the Loan was somehow subsumed within cash amounts being offered by the Private Offering Memorandum or in subsequent negotiations. Even if that were so, FWC had a right to reject the deal if the Loan, itself, was satisfactory, but if FWC found the "business terms and conditions associated with the loan" to be unfavorable, in its "sole opinion."

TGC also argues that FWC orally waived the Loan requirement, accepting a $300,000 contribution from the financing proceeds in its place. However, TGC's Complaint never alleges that the $300,000 was intended by the parties, or accepted by FWC's directors, as a substitute for the Loan. To the contrary, the Complaint alleges that this amount was allegedly offered as a "further accommodation" some weeks after TGC "tendered" performance under the terms of the Private Placement Memorandum. Thus, TGC's main argument on appeal is based on an allegation never made in the Complaint, and which, indeed contradicts the allegations which **were** made.

Even if the Complaint had made the necessary allegations, however, it is plain from the Complaint and its incorporated documents that the alleged "tender" made

by TGC conformed to the Private Placement Memorandum, but **not** to the only signed writings between the parties, the LoI and its modifications.

Because the tender did not conform to the terms of the LoI, TGC has absolutely no claim on the alleged contract. Under the express terms of the LoI, FWC was not even bound to any of its provisions because the Loan had never been paid and received. In addition, FWC had express rights to walk away from the transaction if the Loan, or the conditions associated with it, were unsatisfactory.

TGC's argument thus boils down to its unpled assertion that FWC's directors orally waived the Loan, an express condition precedent,[6] orally waived all FWC's carefully constructed rights to reject the financing arrangement if FWC did not agree to its terms, and orally agreed to bind FWC to transfer half its valuable asset on terms that, with the passage of time, had become less attractive.

The district court, however, would not have been required to credit allegations of oral modification, even if they had been properly pled, because it is plain from the Complaint and its incorporated documents that the Statute of Frauds bars oral modifications of the LoI.

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[6] FWC would also have to have orally waived another express condition precedent, the roll-up acquisition of its related entities, and to have orally agreed to a cash contribution of $4,000,000, instead of the $5,000,000 contemplated by the February 3, 1995 modification.

II. THE STATUTE OF FRAUDS BARS ORAL MODIFICATION OF THE LETTER OF INTENT.

TGC has wisely abandoned its argument below that the Statute of Frauds does not apply to the LoI, which contemplated the ultimate transfer of leaseholds and interests in "real property, well field, easements of ingress/egress, geothermal resources, and associated rights." (Executive Summary, R.16:16) The Statute of Frauds clearly applies to the transaction, as TGC now concedes.

As TGC also concedes, the Statute of Frauds would generally require a writing, signed by FWC, to modify the terms of the LoI. Utah Code Ann. §25-5-1; *Allen v. Kingdon*, 723 P.2d 394, 396-97 (Utah 1986); *Holt v. Katsanevas*, 854 P.2d 575, 579 (Utah App. 1993). TGC argues, however, that the Statute of Frauds does not bar oral modification of the LoI because the allegedly altered terms, including the requirement of the Loan, were immaterial, and because the doctrine of part performance took the transaction out of the Statute. Both assertions are incorrect.

A. The Loan And Other Provisions Protecting FWC's Ultimate Right To Approve All The Terms Of The Financing Arrangement Were Obviously Material.

It cannot seriously be argued that the Loan was immaterial to the transaction. The parties, themselves, defined the Loan as "material" in the LoI and its modifications. Almost every "Material Term" agreed by the parties in the original LoI mentions the Loan and its central position in the transaction. The first written

modification deals entirely with extending the deadline for funding the Loan. The second written modification affirms the materiality of the Loan by, *inter alia*, providing that no one was bound to the LoI, at all, until the Loan was received by FWC.

Nor can it be argued that all FWC's associated rights to accept or reject the ultimate terms of the financing package were immaterial. The LoI and its modifications clearly reflect, time and again, that the parties had not yet agreed on the terms of the final transaction, and that FWC desired to protect itself from being forced to turn over half of a valuable asset on terms which might ultimately prove unfavorable.

B. **The Doctrine Of Part Performance Is Inapplicable Here.**

It is not clear that TGC properly preserved its "part performance" argument below. TGC made arguments about "reliance," and cited several cases. Some of those cases, but not all,[7] are "part performance cases."

In any event, the doctrine of part performance does not apply to this case. It is true that Utah Code Ann. §25-5-8 creates a doctrine of part performance, by which, in narrow circumstances, courts may order specific performance of some contracts which would otherwise be barred by the Statute of Frauds. In every "part performance" case

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[7] In its Memorandum in Opposition to FWC's Motion to Dismiss (R.86), TGC argues "reliance," and cites, *inter alia*, *Birdzell v. Utah Oil Refining Co.*, 242 P.2d 578 (1952), and *English v. Standard Optical Co.*, 814 P.2d 613 (Utah App. 1991). Neither is a part performance case.

cited here and below by GTC, the remedy was enforcement of the contract through specific performance of the alleged oral modification.

However, this is not a specific performance case. TGC has neither requested specific performance as a remedy, nor pled its prerequisites. Instead, TGC seeks exorbitant damages for "profits" allegedly lost. Thus, the doctrine of part performance does not apply to this case.

III. THERE WAS NO BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING.

TGC argues that FWC violated the implied covenant of good faith and fair dealing by exercising its discretionary right to reject the transaction when the Loan was not received and the terms of the transaction became unattractive.

As an initial matter, FWC cannot be held to have breached any provision of the LoI, because FWC was not bound by any of its terms until the Loan was funded and received. Since that never happened – since the only performance allegedly tendered by TGC did not include the Loan – there really was no need for FWC to exercise its discretion.

But, even without the provision of the February 3, 1995 Modification, which rendered the LoI non-binding until the Loan was received, FWC could not have breached the implied covenant of good faith and fair dealing by rejecting the transaction offered by TGC.

As TGC points out, a party may exercise its discretion "for any purpose . . . reasonably within the contemplation of the parties." *Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 451 (Utah App. 1994), *cert. denied* 899 P.2d 1231 (1995) (internal quotations omitted). The covenant of good faith and fair dealing is only breached when "a party uses its discretion for a reason outside the contemplated range – a reason beyond the risks assumed by the party claiming a breach." *Id.*

In this case, it was **explicitly** contemplated by the parties that FWC could walk away from the deal if the Loan was not funded, or if the Loan was not acceptable to FWC "for any reason whatsoever," or if the "business terms and conditions associated with the loan [were] unfavorable," in FWC's "sole opinion." These were the exact risks **expressly** assumed by TGC when it elected to present to FWC a Private Offering Memorandum which did not satisfy the conditions precedent of the LoI, and for which it had not already obtained FWC's approval.

The rule more applicable in this case is that the Court "will not interpret the **implied** covenant of good faith and fair dealing to make a better contract for the parties **than** they made for themselves," nor "to establish new, independent rights . . . . not agreed **upon** by the parties." *Malibu Investment Co. v. Sparks*, 996 P.2d 1043, 1048 (Utah 2000) (quoting *Brown v. Moore*, 973 P.2d 950, 954 (Utah 1998)). What TGC is asking the Court to do – in the name of the implied covenant of **good faith** and fair dealing – is to

read into the contract a right for TGC to make the unilateral determination to substitute a cash payment for the Loan described in the LoI, and, in so doing, to bypass the process set out in the LoI which gave FWC rights to negotiate and be satisfied with the terms of the ultimate transaction and, absent such satisfaction, to walk away.

Put another way, TGC is not before the Court arguing that it fully performed under the parties' contract but FWC exercised its discretion in bad faith to withdraw, anyway. Rather, TGC is arguing that the Court should apply the implied covenant of good faith and fair dealing to alter the contract along the lines of the alleged oral modifications which are barred by the Statute of Frauds.

TGC is arguing that the Court should imply a unilateral right for TGC to alter the "linchpin" term of the contract because, in TGC's view, the substitute performance was just as desirable as the performance called for by the contract.

In the process, TGC is asking the Court to bypass provisions giving FWC the opportunity to negotiated the ultimate terms of the entire transaction, expressly requiring FWC's consent to the terms of that transaction, and allowing FWC to reject the transaction if it the business terms and conditions associated with the Loan – aside from the terms of the Loan itself – were unsatisfactory to FWC.

This would amount to rewriting the contract. That is not the function of the implied covenant of good faith and fair dealing.

IV. A CLAIM FOR QUANTUM MERUIT/QUASI-CONTRACT MAY NOT BE MAINTAINED WHERE AN EXPRESS CONTRACT WAS TERMINATED ACCORDING TO ITS TERMS.

If this case had gone to trial, FWC could have clearly demonstrated that the documents prepared by TGC in its pursuit of an ownership interest in FWC's geothermal plant are of no earthly use or benefit to FWC.

However, even accepting as true TGC's allegation that FWC was somehow benefitted, there can be no claim for quantum meruit or quasi-contract in this case.

A claim for quasi-contract is one form of action for quantum meruit. *Davies v. Olson*, 746 P.2d 264, 269 (Utah App. 1987). "Recovery under quantum meruit presupposes that no enforceable written or oral contract exists." *Id.* at 268. TGC has alleged the existence of a contract. That contract provided for the parties to bear their own costs if the agreement became null and void. (Material Terms ¶ 1(vii), R.16:19) FWC terminated any alleged contract pursuant to its express terms. Therefore, the district court properly held that no claim for quantum meruit could be stated. (R.124)

TGC now argues that an exception to the foregoing rule exists, and is set forth in *Bailey-Allen Co., Inc. v. Kurzet*, 876 P.2d 421 (Utah App. 1994). However, *Bailey-Allen* creates no exception to the rule that a claim for quantum meruit may not exist alongside an express contract. To the contrary, the Court of Appeals expressly held that "there [was] no enforceable contract," before granting recovery in quantum meruit. *Id.* at 425. That was so because, in *Bailey-Allen*, the contract between the parties had

been breached by the party seeking recovery, and it was, therefore, unenforceable by that party. *Id.* at 423-24, 425. Further, the Court of Appeals noted that "[t]he agreement is silent regarding remedies in the event of a breach by either party." *Id.* at 423.

In this case, according to the Complaint, a contract existed. There was no breach. The contract was terminated according to its terms. In addition, in this case, the contract was not silent as to the effect of termination. It expressly stated that each party would bear its own costs in the event the agreement was terminated. The district court thus properly dismissed TGC's quantum meruit and quasi-contract claims.

CONCLUSION

The district court properly held that TGC's Complaint stated no claim. The written contract alleged by TGC permitted FWC to terminate the relationship. No oral modifications were permitted under the Statute of Frauds, and no theory of quantum meruit applies to compensate TGC for documents it prepared for the failed relationship.

The decision of the district court should be affirmed.

DATED this 20th day of November, 2000.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPELLEES' BRIEF** was hand-delivered to the following this 20th day of November, 2000.

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